Supreme Court, U.S.
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92-1323

No. _____

In The

Supreme Court of the United States

October Term, 1992

UNITED TRANSPORTATION UNION,

Petitioner,

v.

CUYAHOGA VALLEY RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date: February 8, 1993

(C) 302

QUESTION PRESENTED FOR REVIEW

Where a rail carrier defends its apparent violation of a labor agreement with one union on the basis of its labor agreement with another union, is the union claiming agreement violation entitled to mandatory arbitration under Section 3 of the Railway Labor Act (45 U.S.C. § 153) to resolve the dispute?

PARTIES TO THE PROCEEDINGS BELOW

1. United Transportation Union, plaintiff-appellant below

2. Cuyahoga Valley Railway Company, defendant-appellee below

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner United Transportation Union ("UTU") respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review, and upon review, to reverse the November 10, 1992 decision and the November 11, 1992 judgment of that Court in *United Transportation Union v. Cuyahoga Valley Railway Company*, 6th Cir. No. 92-3013.

OPINIONS BELOW

The opinion of the Court of Appeals, which is officially reported at 979 F.2d 431 (6th Cir. 1992), and the

memorandum of opinion of the district court for the Northern District of Ohio, Eastern Division, not yet reported, appear in the Appendix to this petition at App. 1 – App. 8 and App. 10 – App. 18, respectively. References to "App." are to the appendix hereto, and those to J.A. are to the Joint Appendix in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1992. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this proceeding is the Railway Labor Act ("RLA") (45 U.S.C. § 151 *et seq.*), pertinent provisions of which are set forth at App. 20 – App. 26.

STATEMENT OF THE CASE

On May 20, 1991, UTU filed an action in district court pursuant to Section 3 First(q) of the RLA [45 U.S.C. § 153 First(q)] seeking review of Award No. 1 of Public Law Board No. 4745, set up under Section 3 Second of the RLA (45 U.S.C. § 153 Second), which held that a grievance filed by UTU on behalf of certain employees it represents concerning application of certain seniority provisions of its collective bargaining agreement with the Cuyahoga

Valley Railway Company (hereinafter, "Cuyahoga") was outside the scope of its jurisdiction.

On November 26, 1991, the district court denied UTU's motion for summary judgment and granted Cuyahoga's like motion, holding the underlying grievance constituted a "major dispute" outside the scope of the Board's jurisdiction under Section 3 Second of the RLA (45 U.S.C. § 153 Second) to resolve "minor disputes." On November 10, 1992, the Court of Appeals issued a decision affirming the district court, entering judgment on November 11, 1992.

STATEMENT OF FACTS

The facts are not in dispute, were accurately stated by the Court of Appeals in its November 10, 1992 Decision (App. 2 – App. 4) and are repeated below.

> Cuyahoga's diesel shop is divided into four departments: The Car Department; the Maintenance of Equipment Department;[1] the Maintenance of Way Department; and the Clerical Department. For a number of years the employees in all four departments were represented by the United Steelworkers of America ("Steelworkers"). The relationship between the Steelworkers and Cuyahoga was governed by a

[1] The "Maintenance of Equipment Department" is referred to in the Public Law Board's opinion as the "Diesel Shop." However, we refer to all four departments collectively as the diesel shop as do the parties and the district court.

collective bargaining agreement that they executed on January 1, 1984. This collective bargaining agreement permitted employees to transfer among the four diesel shop departments. This agreement also allowed employees to maintain their seniority rights in the department from which they had transferred. This allowed employees to exercise their previously-accrued seniority rights to take a job in their former department if they were laid off.[2]

In May, 1988, the National Mediation Board conducted an election in the diesel shop to determine whom the diesel shop employees wished to have as their collective bargaining representative. Each Department voted separately. As a result of the election, the UTU was certified by the National Mediation Board as the exclusive bargaining agent for the employees in three of the departments. The Steelworkers continued to represent the Car Department employees. The 1984 agreement remained in effect in all four departments, although the UTU

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[2] Paragraph 2(b) of Article 6 of the 1984 agreement provides:

> When a reduction in forces is made, it shall be in the reverse order of seniority within the department, starting with the highest job affected and with the employe on such job having the least seniority. Employes who have been promoted or transferred from one department to another may, when laid off in such department, displace any employe their junior in another department, provided they have seniority rights and qualifications for the position.

J.A. at 82.

assumed the representation of the employees in the departments other than the Car Department.

In early 1989, Cuyahoga and the Steelworkers agreed to modify the collective bargaining agreement with respect to the Car Department. The effect was to eliminate the other three department from the scope of their agreement and to modify the seniority rights of former and current Car Department employees. All former Car Department employees who had left the Car Department before February 1, 1989, for other jobs in the diesel shop had to return to their former jobs in the Car Department by March 1, 1989, or they would lose their seniority rights in the Car Department. Seven former Car Department employees, who were members of the UTU and were then employed in other departments, were notified of this change.

On February 16, 1989 the UTU filed a grievance with Cuyahoga on behalf of the seven former Car Department employees who had transferred from the Car Department and were about to lose their Car Department seniority rights. Cuyahoga denied the grievance on February 24, 1989. The UTU then appealed the matter to a conference between the Union and high level Cuyahoga officials pursuant to section 3 First(i) of the RLA. 45 U.S.C. § 153 First(i) (1988). Cuyahoga denied the appeal on March 27, 1989. The UTU then appealed to the Public Law Board.

The Board, after a hearing, held that this matter was not within its jurisdiction because the basis of the dispute was the failure of Cuyahoga to bargain collectively with the UTU with respect to the seniority issue. It held that a

Pubic Law Board only has jurisdiction over matters involving contract application or interpretation, and that the matter before it did not involve issues of application of interpretation.

REASONS FOR GRANTING THE WRIT

1. This Court should decide the important statutory issue of whether a rail carrier's defense of a claim of agreement violation by one union by reliance upon its agreement with another union is arbitrable under Section 3 of the RLA (45 U.S.C. § 153) as a "minor dispute," as is clearly indicated by the decisions of this Court in *Consolidated Rail Corp v. Railway Labor Execs. Ass'n*, 491 U.S. 299, 302 (1989) and *Transportation-Communications Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

In *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723-24 (1945) the Court divided RLA agreement disputes into two categories: (1) "major disputes," relating to contract formation or changes in agreements; and, (2) "minor disputes," relating to interpretation or application of existing agreements. *Id.* If a dispute is "major," the aggrieved party has a right to self-help or injunctive relief requiring maintenance of the status quo. *See, Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969). If a dispute is "minor," neither self-help, nor injunction are available, as the parties are remanded to the exclusive and mandatory arbitral remedies of Section 3 of the RLA (45 U.S.C. § 153). *See, Bhd. of Railroad Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30 (1957).

In *Consolidated Rail Corp. v. Railway Labor Execs. Ass'n*, 491 U.S. 299 (1989) the Court reviewed *Burley, supra*, noting that the teaching of that case was that with regard to a disputed action taken by one of the parties, the question to be answered is whether the terms of an existing contract establish or refute the right to take such action. *Conrail, supra*, 491 U.S. at 302-305. The Court recognized that the party initiating the claim could defeat the purposes of the RLA by defining the dispute to its advantage in its pleading. *Conrail, supra*, 491 U.S. at 306. The Court found that allowing one party to determine the nature of the dispute would be improper and thus determined that it is the court, and not the parties, who will determine whether a dispute is major or minor. *Id.* at 310; *see also, Bhd. of Railroad Trainmen v. Chicago River and Indiana R.R., supra; Union Pacific R.R. v. Price*, 360 U.S. 601 (1959).

In this case, the Steelworkers represented one department of the Diesel Shop, while the UTU represented the other three departments. Until January, 1989, all four departments were working under the exact same collective agreement, and the seniority rights of the employees represented by the different unions were "significantly intertwined." On January 24, 1989, the Steelworkers and Cuyahoga negotiated a change to their agreement. The UTU does not dispute Cuyahoga's right to bargain with the Car Department employees' exclusive representative, the Steelworkers. What is a matter of concern is the application of that Steelworkers-Cuyahoga agreement to employees holding Car Department seniority resulting in their seniority being extinguished contrary to the UTU-Cuyahoga agreement.

In this regard, *Burley, supra,* 325 U.S. 711, clearly states that when a dispute "relates either to the meaning or proper application of a particular provision with reference to a specific situation is it a 'minor dispute.' " *Id.* at 724. The case at bar is exactly this. Cuyahoga on March 1, 1989, applied of the Steelworkers-Cuyahoga agreement to the seven former Car Department employees resulting in their losing their fall-back seniority provided for in the Cuyahoga agreement. Such a dispute is clearly related to the application of particular contract provisions of two separate agreements.

Moreover, *Burley, supra,* 325 U.S. at 723-724, further defined the scope of "minor disputes" as one involving "rights accrued." Here the seven employees had been employed in the Car Department and **had** established seniority rights in that department. Those "accrued rights" were arguably extinguished by application of the Steelworkers-Cuyahoga agreement.

Furthermore, the standard set forth in *Conrail, supra,* 491 U.S. 299, requires that disputes such as these be arbitrated. The standard established by the Court is whether a contested action can "arguably" be justified by the terms of a collective agreement. *Conrail, supra,* 491 U.S. at 307. Cuyahoga has asserted that it took its action based on the terms of the Steelworkers' agreement. It cannot be more evident that the disputed action herein was "arguably" justified by the terms of that agreement. The "light burden" to establish a "minor" dispute is easily met here. *Id.*

Moreover, the policy stated by the Court in *Conrail,* in light of the core purpose of the RLA, favors resolution by

the "minor disputes" procedure in order to avoid interruption of commerce, i.e., strikes. 491 U.S. at 310-11. If this dispute were "major," then the UTU would be able to strike here, and each time there is a question concerning the *application* of new contract provisions. Such a strike is directly at odds with the core purpose of the Act.

Transportation-Communications Employees v. Union Pacific R.R., 385 U.S. 157 (1966) (*TCU v. UP*), which was cited to both courts below, but which both courts failed to address, involved the Transportation Communications Union ("TCU") representation of telegraphers and the Brotherhood of Railway Clerks ("BRAC") representation of clerks. Prior to 1952, telegraphers sent by telegraph various bills, manifests and orders prepared by the clerks. *TCU v. UP*, 385 U.S. at 157-158. In 1952, however, the Union Pacific installed computers which performed the telegraphing function previously done by the telegraphers. Union Pacific assigned the work of operating the computers to the clerks. *Id.* at 158. The TCU filed a grievance claiming the work for its telegrapher members. The matter reached arbitration of which BRAC was given notice, but declined to participate. *Id.* at 158-159. The arbitration board decided that the work belonged to the telegraphers, without considering the application of the clerks' contract. *Id.* at 159. When Union Pacific refused to pay the telegraphers as per the arbitration award, the TCU filed suit to enforce the award, *Id.* at 159-160. The court of appeals affirmed the district court's dismissal of the action, stating that the arbitration board "has failed to carry out its exclusive jurisdictional responsibility to decide the entire dispute with relation to the conflicting claims of two unions under their respective contracts to

have the jobs assigned to their members." *Id.* at 160. The Court granted *certiorari* to determine "whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present." *Id.*

The Court, in affirmatively answering the question posed, vacated the award, stating that "[i]n order to interpret [a collective-bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements." *Id.* at 161. The Court noted that the dispute involved the elimination of one job and the creation of another not expressly contracted to either of the two unions. *Id.* Only one union would be entitled to the work and the other union's contract may call for a payment due to the loss of work from automation. If the Board requires payment to one union and then in a separate proceeding requires payment to the other, without determining who gets the work, the Board abdicates its statutory duty to resolve a dispute between a railroad and two of its unions over conflicting provisions in their collective agreements. *Id.* at 162. Because the issue raised a matter concerning the interpretation and application of agreements, the court has no authority to intervene and determine the matter. *Id.* at 162-164, citing *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946). *See also, United Transportation Union v. Southern Pacific Trans. Co.,* 529 F.2d 691, 693 (5th Cir. 1976). Such matters must be returned to the arbitration board for determination. *See, Pitney, supra; Slocum v. Delaware, L&W R. Co.,* 339 U.S. 239 (1950); *Order of Railway Conductors of America v. Southern R. Co.,* 339 U.S. 225 (1949). It is the board, with its special expertise and specialized knowledge, that is singularly

equipped to determine and resolve differences between competing agreements. *TCU v. UP,* 385 U.S. at 163, citing *Pitney, supra,* at 165.

The teaching of these cases is clear. The board has sole authority to interpret the application of collective agreements, and in doing so, must, when interpreting one contract, view it in light of others between the railroad and another union involved. Here, like *TCU v. UP, supra,* the dispute involves the contrary provisions of two separate collective-bargaining agreements. The Steelworkers-Cuyahoga agreement terminated the fall-back seniority rights of the seven former Car Department employees while the UTU-Cuyahoga agreement preserved such fall-back rights. This conflict, according to *TCU v. UP, supra,* can only be resolved by and through arbitration, as it is a "minor dispute," and the arbitrator has a duty to consider both contracts in order to resolve the dispute.

2. This Court should grant the petition because of the apparent conflict between the decision of the Court of Appeals and the decision of the Seventh Circuit in *Atchison, Topeka & Santa Fe Ry. v. UTU,* 734 F.2d 317 (7th Cir. 1984).

The court below not only failed to recognize or consider controlling decisions of the Court, but also failed to deal with a decision of another Circuit that is virtually "on all fours" with the case at bar, *Atchison, Topeka & Santa Fe Ry. v. United Transportation Union,* 734 F.2d 317 (7th Cir. 1984) (*ATSF v. UTU*). In that case, the UTU

represented firemen while the Brotherhood of Locomotive Engineers ("BLE") represented engineers. Engineers typically begin as firemen and after a period of training and testing, they can be promoted to engineers. However, they retain their fireman seniority rights and can flow back to work as a fireman when there is no engineer work available for them. *Id.* at 318. As a fireman, the employee works under the UTU collective-bargaining agreement, and when working as an engineer, the employee works under the BLE agreement. *Id.* The BLE and Santa Fe agreed to eliminate Chicago as the home terminal for road engineers and expand the seniority district of Chicago yard engineers. *Id.* The UTU, as it did here, objected to the BLE agreement arguing that it violated the UTU-Santa Fe agreement. *Id.* at 318-19. The Santa Fe argued that the BLE agreement did not affect firemen. *Id.* at 319. The UTU threatened to strike. *Id.* The Santa Fe was granted summary judgment and a permanent injunction against the strike, as the district court determined the matter was a "*minor* dispute." *Id.* On appeal, the UTU again argued that the matter was a "major dispute." The court of appeals rejected the argument and affirmed the lower court's "minor dispute" finding. In its decision, the Seventh Circuit went directly to *Elgin, Joliet & Eastern R. v. Burley, supra,* 325 U.S. 711, and reasoned:

> "[T]he test is whether the conflict can be resolved by reference to an existing agreement. [*Chicago & Northwestern Transportation Co. v. UTU,* 656 F.2d at 277]. Where the parties disagree as to whether the existing contract permits the carrier's actions, the dispute is minor unless the carrier's claims of contractual justification

> are " 'frivolous' or 'obviously insubstantial.' " *Id.* at 279; *see also Air Line Pilots Association, International v. TWA*, 713 F.2d 940, 948 (2d Cir. 1983). Such a test is necessary to protect the jurisdiction of the NRAB and to promote the purposes of the Railway Labor Act. *See generally Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 99 S.Ct. 399, 402, 58 L.Ed.2d 354 (1978).

734 F.2d at 321.

Applying the test stated, the Seventh Circuit panel found the matter to be a "minor dispute," as it depended upon an interpretation of the rights existing under the UTU-Santa Fe agreement. Moreover, the court of appeals stated:

> We cannot say that the Santa Fe's argument that its agreement with the BLE does not infringe on rights guaranteed by its agreements with the UTU is frivolous or insubstantial. Moreover, the NRAB does have jurisdiction in this case to issue a final decision involving the rights of all parties. *See, Transportation-Communications Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 87 S.Ct. 389, 17 L.Ed.2d 264 (1966); *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co.*, 447 F.2d 1127 (5th Cir. 1971).

734 F.2d at 321.

This case is remarkably similar to the present case, yet both courts below simply ignored its existence. In *ATSF v. UTU, supra*, there were two groups of employees with different seniority rosters as in the present case. And as in the present case, the employees in one group retained seniority rights they could exercise to flow to the

other. And again, as in the case at bar, one union made an agreement with the employer which affected the seniority rights held by the group represented by the rival union. The Seventh Circuit there held the matter to be "minor," while both lower courts here held the matter to be a "major dispute." This apparent conflict in the circuits can only be resolved by the Court.

CONCLUSION

For the foregoing reasons, Petitioner UTU respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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Date: February 8, 1993

APPENDIX

No. 92-3013

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED TRANSPORTATION UNION,	)	
Plaintiff-Appellant,	)	ON APPEAL from the
v.	)	United States District
	)	Court for the Northern
CUYAHOGA VALLEY RAILWAY COMPANY,	)	District of Ohio
Defendant-Appellee.	)	

Decided and Filed November 10, 1992

Before: JONES and SILER, Circuit Judges; and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge. Plaintiff, United Transportation Union ("UTU"), appeals from the district court's grant of summary judgment in favor of Defendant, Cuyahoga Valley Railway Company ("Cuyahoga"), in this action under the Railway Labor Act ("RLA"). The UTU challenged a decision of a Public Law Board in district court, contending that the Board improperly refused to take jurisdiction over a dispute between the UTU and Cuyahoga. The district court held that the Public Law Board was correct in concluding that the dispute between the UTU and Cuyahoga

was a "major" dispute rather than a "minor" dispute and, therefore, was not subject to the jurisdiction of the Public Law Board. For the reasons stated below, we affirm the judgment of the district court.

I

Cuyahoga's diesel shop is divided into four departments: the Car Department; the Maintenance of Equipment Department;[1] the Maintenance of Way Department; and the Clerical Department. For a number of years the employees in all four departments were represented by the United Steelworkers of America ("Steelworkers"). The relationship between the Steelworkers and Cuyahoga was governed by a collective bargaining agreement that they executed on January 1, 1984. This collective bargaining agreement permitted employees to transfer among the four diesel shop departments. This agreement also allowed employees to maintain their seniority rights in the department from which they had transferred. This allowed employees to exercise their previously-accrued seniority rights to take a job in their former department if they were laid off.[2]

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[1] The "Maintenance of Equipment Department" is referred to in the Public Law Board's opinion as the "Diesel Shop." However, we refer to all four departments collectively as the diesel shop as do the parties and the district court.

[2] Paragraph 2(b) of Article 6 of the 1984 agreement provides:

> When a reduction in forces is made, it shall be in the reverse order of seniority within the department, starting with the highest job affected and with the employe on such job having the least seniority.

In May, 1988, the National Mediation Board conducted an election in the diesel shop to determine whom the diesel shop employees wished to have as their collective bargaining representative. Each department voted separately. As a result of the election, the UTU was certified by the National Mediation Board as the exclusive bargaining agent for the employees in three of the departments. The Steelworkers continued to represent the Car Department employees. The 1984 agreement remained in effect in all four departments, although the UTU assumed the representation of the employees in the departments other than the Car Department.

In early 1989, Cuyahoga and the Steelworkers agreed to modify the collective bargaining agreement with respect to the Car Department. The effect was to eliminate the other three departments from the scope of their agreement and to modify the seniority rights of former and current Car Department employees. All former Car Department employees who had left the Car Department before February 1, 1989, for other jobs in the diesel shop had to return to their former jobs in the Car Department by March 1, 1989, or they would lose their seniority rights in the Car Department. Seven former Car Department employees, who were members of the UTU and were then employed in other departments, were notified of this change.

> Employes who have been promoted or transferred from one department to another may, when laid off in such department, displace any employe their junior in another department, provided they have seniority rights and qualifications for the position.

J.A. at 82.

On February 16, 1989, the UTU filed a grievance with Cuyahoga on behalf of the seven former Car Department employees who had transferred from the Car Department and were about to lose their Car Department seniority rights. Cuyahoga denied the grievance on February 24, 1989. The UTU then appealed the matter to a conference between the Union and high level Cuyahoga officials pursuant to section 3 First (i) of the RLA. 45 U.S.C. § 153 First (i) (1988). Cuyahoga denied the appeal on March 27, 1989. The UTU then appealed to the Public Law Board.

The Board, after a hearing, held that this matter was not within its jurisdiction because the basis of the dispute was the failure of Cuyahoga to bargain collectively with the UTU with respect to the seniority issue. It held that a Public Law Board only has jurisdiction over matters involving contract application or interpretation, and that the matter before it did not involve issues of application or interpretation.

The UTU then filed a petition in federal district court to review and set aside the decision of the Public Law Board, and both parties moved for summary judgment. The district court granted summary judgment for Cuyahoga. The court held that this was a major dispute because it arose from modifications in the 1984 agreement by the 1989 contract between Cuyahoga and the Steelworkers rather than from interpretation of the 1984 agreement, and because the UTU was challenging the validity of the 1989 contract between Cuyahoga and the Steelworkers. Thus, the district court concluded that the dispute between the UTU and Cuyahoga was a major dispute, which was not within the jurisdiction of the Public Law Board. This timely appeal followed.

II

This court reviews the grant of Defendant's motion for summary judgment *de novo. Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990). Since there are no factual issues in dispute, the only issue for review in this case is a matter of law. The issue of law that we must decide is whether this dispute should be characterized as a major dispute or as a minor dispute.

III

Minor disputes involve the interpretation or application of particular provisions of existing collective bargaining agreements. 45 U.S.C. § 153 First (i) (1988); *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). Minor disputes arise when both parties claim a right under an existing collective bargaining agreement. *Id.* The distinguishing feature of a minor dispute is that it can be "conclusively resolved by interpretation of the existing agreement" between the parties. *Consolidated Ry. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 305 (1989) ("Conrail").

Major disputes involve the formation of collective bargaining agreements. *Burley*, 325 U.S. at 723. Major disputes arise when the parties seek to negotiate a new agreement or to make changes in an existing agreement. *Conrail*, 491 U.S. at 302. Major disputes also arise when there is a unilateral change in "rates of pay, rules or

working conditions." 45 U.S.C. § 152 Seventh (1988).[3] When it is unclear whether a dispute is a major dispute or a minor one, the dispute should be characterized as a minor if the carrier's actions are "arguably justified by the terms of the parties' collective-bargaining agreement." *Conrail*, 491 U.S. at 307.

To resolve a minor dispute, the parties first resort to the grievance procedure mandated by their collective bargaining agreement. 45 U.S.C. § 153 First (i) (1988). If the grievance procedure fails to resolve the dispute, the next step is a conference between union and carrier officials. *Id.* If the conference does not settle the dispute, then it must be submitted to arbitration. 45 U.S.C. § 153 First (i), (m) (1988). Arbitration may be conducted by the National Railroad Adjustment Board, 45 U.S.C. § 153 First (i) (1988), or the parties may agree in advance to submit their dispute to another arbitral board such as a Public Law Board. 45 U.S.C. § 153 Second (1988). Decisions of an arbitral board are binding and are subject to very limited judicial review. 45 U.S.C. § 153 First (q) (1988).

To resolve a major dispute, the parties must first negotiate over the disputed change. 45 U.S.C. § 156 (1988). If negotiation fails, the parties may then resort to mediation by the National Mediation Board. *Id.* The carrier may not make the disputed change as long as the

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[3] 45 U.S.C. § 152 Seventh (1988) provides:
No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

mediation process continues. *Conrail*, 491 U.S. at 302-03; 45 U.S.C. § 156 (1988). If the carrier does attempt to make the change, a federal district court has the power to enjoin the carrier from making it. *Conrail*, 493 U.S. At 303.

IV

In this case, the UTU argues that this dispute is a minor dispute because it can be resolved by interpreting the conflicting provisions of the Cuyahoga-Steelworkers agreements; therefore, it argues, the Public Law Board is the appropriate body to decide this dispute. Cuyahoga responds that it does not rely on the 1984 agreement to support the change in seniority rules; it contends that it had a statutory duty to bargain with the Steelworkers and that it met that duty by negotiating the 1989 agreement. Cuyahoga further argues that this is not a matter of contract interpretation at all because "there are no competing contract provisions [in the 1989 agreement] which trigger this dispute." Rather, Cuyahoga argues, the UTU is in reality challenging the validity of the 1989 Cuyahoga-Steelworkers agreement. Such a challenge, they argue, is a major dispute.

In this case, the Public Law Board was not presented with a dispute involving the interpretation of either the 1984 or the 1989 Cuyahoga-Steelworkers agreement. The meaning of the agreements was clear. Rather, the issue submitted to the Public Law Board to decide was whether Cuyahoga and the Steelworkers could legally modify he 1984 collective bargaining agreement, insofar as it dealt with the Car Department, without including the UTU, by

then a party to the agreement, in the negotiations. Whenever a dispute arises over the modification of an existing collective bargaining agreement, it is a major dispute. *Burley*, 325 U.S. at 723. Under the RLA, arbitral boards have no jurisdiction over major disputes. 45 U.S.C. § 153 First (i) (1988); 45 U.S.C. § 152 Seventh (1988). Consequently, the Public Law Board correctly decided that it did not have jurisdiction over the dispute.

As additional support for our conclusion, we point out that before the Public Law Board, the UTU actually argued that the 1989 contract between Cuyahoga and the Steelworkers was invalid because the UTU was not a party to the negotiations over the 1989 modifications of the 1984 contract. A Public Law Board, however, as stated, does not have jurisdiction over a challenge to the validity of a collective bargaining agreement. *Brotherhood of Railway Trainmen v. Howard*, 343 U.S. 768, 774 (1952). Instead, a challenge to the validity of a collective bargaining agreement is within the jurisdiction of the federal courts. *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d 282, 285-86 (6th Cir.), *cert. denied*, 356 U.S. 937 (1958). Therefore, we conclude that the Public Law Board did not have jurisdiction to decide this dispute.

V

Because we conclude that the dispute between the UTU and Cuyahoga is a major dispute, we affirm the district court's grant of summary judgment.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988
LEONARD GREEN **TELEPHONE**
CLERK **(513) 684-2953**
FTS 684-2953

November 11, 1992

Kevin C. Brodar
Ronald J. James
Helen Kryshtalowych
Mark D. Katz

Re: Case No. 92-3013
United transportation Union v. Cuyahoga Valley Railway Company
District Court No. 91-00973

Dear Counsel:

The court today announced its decision in the above-styled case.

A copy of the court's opinion is enclosed and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard Green, Clerk
By /s/ Linda K. Martin
(Mrs.) Linda K. Martin
Deputy Clerk

Enclosure
paw

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED TRANSPORTATION UNION,	)	CASE NO. 1:91CV0973
Petitioner,	)	Judge John M. Manos
v.	)	
CUYAHOGA VALLEY RAILWAY CO.,	)	MEMORANDUM OF OPINION
Respondent.	)	

On May 20, 1991, petitioner United Transportation Union ("UTU") filed the above-captioned case against Respondent, Cuyahoga Valley Railway Company ("Railway") requesting this court to review and set aside the award of a Public Law Board under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* UTU and the Railway have each filed Motions for Summary Judgment. For the following reasons, the Railway's Motions for Summary Judgment is granted and UTU's corresponding Motion is denied.

I.

There is no dispute about the material facts of this case. The Railway's diesel shop is comprised of the Car department, the Maintenance of Equipment department, the Maintenance of Way department, and the Clerical department. Prior to May 10, 1988, the Railway's diesel shop employees were represented by the United Steel Workers of America ("USW"), and were governed by a

collective bargaining agreement entered into by the Railway and the USW. The collective bargaining agreement covered issues of transfer between the four departments and inter-departmental seniority rights.

On May 10, 1988, an election was held to determine the employees' representation choice. Each department voted separately. As a result of the election the UTU was certified by the National Mediation Board as the bargaining agent for the employees of the Maintenance of Equipment, Maintenance of Way, and Clerical departments. The USW continued to represent the Car department employees. The provisions of the collective bargaining agreement negotiated with the USW remained in effect for all four departments.

On January 24, 1989, the Railway and the USW entered into negotiations to modify their collective bargaining agreement. The agreement was narrowed in scope to include only the Car department which had retained the USW as agent. The agreement also modified several contract provisions. One of the modifications affected the seniority rights of present and former Car department employees. The modification required that employees who had transferred from the Car department either return to work there or lose their seniority. This modification was agreed to between the USW and the Railway and seven former Car department employees who had transferred were notified of the changes.[1]

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[1] None of the seven former Car department employees transferred back to the Car department and their names were removed from the Car Department Seniority Roster.

The modification stated:

> Any employe who prior to February 1, 1989, transferred to a department which is now not covered by the scope of this Agreement, shall have until March 1, 1989 to return to the Car Department. If such an employe has not returned to the Car Department by March 1, 1989, he shall be removed from the Car Department Seniority Roster and his seniority rights in such Department shall be terminated.

On February 16, 1989, the UTU filed a grievance with the Railway stating that it had "acted in an unjust and arbitrary manner by forcing a unilateral change in the current agreement." The grievance claimed that the negotiations between the Railway and the USW, and the resulting modifications, were invalid. The invalidity allegedly arose from the fact that the UTU did not have the opportunity to act as agent for the former Car department employees during the bargaining. The Railway denied the grievance on February 24, 1989, and the UTU appealed. A conference was held and the appeal was denied on March 27, 1989. The UTU then appealed to the Public Law Board.

In their complaint to the Board, the UTU stated that the Railway had "arbitrarily and unilaterally removed [the seven UTU union members] from the car shop seniority list." Employee Submission at 1. The Public Law Board stated UTU's claim to be the refusal of the Railway "to lawfully negotiate the terms of the contested seniority provisions with the [UTU]." Public Law Board No. 4745, Award No. 1, Case No. 1 at 6. The UTU alleged that their certification as the bargaining agent for the other three

departments caused the earlier existing agreement, between the USW and the Railway, to become a "tripartite agreement" between the UTU, the USW, and the Railway. Employee Submission at 4, 6. The UTU claimed that this third party interest afforded them the right to negotiate issues in that agreement which affected employees now represented by them. Without their presence, negotiated changes in the agreement were invalid as to those employees. Employee Submission at 5-7.

A hearing before the Board was held on January 22, 1990. On March 9, 1990, the Board determined that the issues raised in the grievance were outside the scope of its jurisdiction as defined by the Public Law Board Agreement and the RLA. The Board found that the dispute did not involve either contract application or interpretation, which fall within its jurisdiction, but involved a violation of the statutory duty to bargain, which does not fall within its jurisdiction. Public Law Board No. 4745, Award No. 1, Case No. 1 at 10-11.

On March 20, 1991, the UTU filed its petition with this court to set aside the award of the Public Law Board. After the Railway filed its answer, the UTU filed a Motion for Summary Judgment. The Railway then filed its Motion for Summary Judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Since the facts in this case are

not disputed, summary judgment is particularly appropriate.

The issue before this court is whether UTU's complaint raises a minor dispute which can be resolved by the Public Law Board, or a major dispute over which the Public Law Board has no jurisdiction.

II.

The difference between disputes over the application or interpretation of collective bargaining agreements and disputes concerning the making of those agreements is a "traditional" one in railway labor affairs. *Elgin, Joliet & Eastern Railway Co. v. Burley,* 325 U.S. 711, 722 (1945). The difference is in the characterization of disputes as either "minor" or "major". *Id.* at 723.

Minor disputes involve the interpretation or application of an existing agreement. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n.*, ___ U.S. ___; 109 S.Ct. 2477, 2481 (1989). They are also described as those "which inevitably appear in the carrying out of major agreements and policies." *International Brotherhood of Firemen & Oilers v. Consolidated Rail Corp.*, 560 F.Supp. 169, 173 (S.D. Ohio 1982), *citing Elgin,* 325 U.S. at 724.

The statutory basis for the Railroad Adjustment Board's jurisdiction over minor disputes is 45 U.S.C. § 153 First(i) and Second. 45 U.S.C. § 153 First(i) states in part:

> The disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner

> . . . failing to reach an agreement . . . the disputes may be referred [to the] Adjustment Board . . .

45 U.S.C. § 153 Second allows for the formation of other arbitration boards, such as Public Law Boards, to decide minor disputes in lieu of the Railroad Adjustment Board. § 153 Second states in part:

> Nothing in this section shall be construed to prevent any individual carrier . . . and any class . . . of its . . . employees . . . from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section.

The term "major dispute" refers to disputes over the "formation of collective agreements or efforts to secure them." *Elgin* at 723. Major disputes arise when an agreement is being negotiated or when changes or modifications are being sought in an existing agreement. *Id.* The Court contrasts these disputes with minor disputes in which "no effort is made to bring about a formal change in terms or to create a new [agreement]." *Id.* at 723. The term major also relates to those disputes arising out of a unilateral change in existing terms or conditions of employment. *United Transportation Union, Local 63E v. Penn Central Co.*, 443 F.2d 131 (6th Cir.), *cert. denied*, 404 U.S. 938 (1971); *Brotherhood of Locomotive Firemen & Enginemen v. Detroit and Toledo Shoreline R.R. Co.*, 421 F.2d 660 (6th Cir. 1970).

Major disputes are those which arise in violation of 45 U.S.C. § 152 Seventh which states that "[n]o carrier . . . shall change the rates of pay, rules, or working

conditions of its employees . . . except in the manner prescribed in such agreements or in section 156 of this title."[2]

The distinction between the types of disputes is important because the RLA "sets up different procedures for resolution of each type of controversy. . . . " *Firemen & Oilers,* 560 F.Supp. at 172. The first step "toward settlement of either kind of dispute is negotiation and conference between the parties. Thereafter, procedures for major and minor disputes diverge." *Ashley, Drew & Northern Ry. Co. v. UTU,* 625 F.2d 1357, 1368 (8th Cir. 1980).

In a major dispute, the step after negotiation is conciliation by the National Mediation Board under 45 U.S.C. § 156. To maintain the status quo during conciliation, the district courts may enjoin the carrier from making any changes. 45 U.S.C. § 156; *Firemen & Oilers* at 172, *citing Detroit & Toledo Shore Line R.R. Co. v. UTU,* 396 U.S. 142 (1969). In a minor dispute the parties proceed under 45

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[2] 45 U.S.C. § 156 states, in part:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference . . . shall be agreed upon within ten days. . . . In every case where such notice of intended change has been given . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon . . . by the Mediation Board. . . .

U.S.C. § 153 First(i) and (m),[3] which mandates "final and binding" arbitration by the National Railroad Adjustment Board, or a mutually agreed upon Board. The status quo provision of § 156 does not apply to minor disputes.

In this case the USW and the Railway made modifications in an existing bargaining agreement without representation from the UTU. The dispute arose because of the modifications and not because of differences in the interpretation of the contract provisions. The Supreme Court in *Elgin* held that a major dispute arises "where it is sought to change the terms" of an existing agreement. *Elgin* at 723. Under *Elgin* the dispute in this case is a major dispute.

The Supreme Court has also held that when the validity of the contract is in dispute, the claim cannot "be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board. . . . " *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774 (1952). The Sixth Circuit stated that "the court ha[s] jurisdiction in cases under the [RLA] which involve . . . the validity of an agreement under the Act." *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d 282, 286 (6th Cir.), *cert. denied*, 356 U.S. 937 (1958), *citing*, *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, 204 (1944). When a case "poses a genuine issue as to validity, not interpretation [of an agreement] . . . it is one for

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[3] 45 U.S.C. § 153(m) states, in part:
. . . the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board . . . shall interpret the award . . .

judicial consideration." Order of Railway Conductors and Brakemen v. Switchmen's Union of North America, 269 F.2d 726, 729 (5th Cir. 1959), *citing Smith* and *Howard.* Since the UTU alleges that the agreement between the Railway and the USW is invalid as to the employees who transferred from the car department prior to the modification, their claim is one involving a "major" dispute.

The UTU also alleges that the change was accomplished "unilaterally" because all necessary parties were not present during negotiations. Disputes arising out of a unilateral change in terms of employment are also designated as major. *United Transportation Union, Local 63E,* 443 F.2d at 131.

The Public Law Board has no jurisdiction under the RLA to hear major disputes. Accordingly, the Public Law Board's determination that it was without jurisdiction to hear this case is affirmed. The Railway's motion for summary judgment is granted and the UTU's corresponding motion is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED TRANSPORTATION UNION,	)	CASE NO. 1:91CV0973
Petitioner,	)	Judge John M. Manos
v.	)	ORDER
CUYAHOGA VALLEY RAILWAY CO.,	)	
Respondent.	)	

Pursuant to the Memorandum of Opinion in the above-captioned case, the Respondent's Motion for Summary Judgment is granted and the Petitioner's corresponding Motion is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES
DISTRICT JUDGE

STATUTES INVOLVED

Section 152 Ninth, Title 45, United States Code, provides:

> **Ninth. Disputes as to identity of representatives; designation By Mediation Board; secret elections.** If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated the authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who

may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 153 First(i), Title 45, United States Code, provides:

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 153 First(j), Title 45, United States Code, provides:

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and

the carrier or carriers involved in any disputes submitted to them.

Section 153 First(q), Title 45, United States Code, provides:

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of

the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

Section 153 Second, Title 45, United States Code, provides:

> **Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.** Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.
>
> If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has

been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of

the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the Board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply there with on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings

for enforcement of compliance with awards of the Adjustment Board.

Section 156, Title 45, United States Code, provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.